

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Daniel Giansante	Team: Squad #5	CCRB Case #: 201802463	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Wednesday, 03/28/2018 7:50 PM	Location of Incident: In front of 10-26 41st Avenue	Precinct: 114	18 Mo. SOL 9/28/2019	EO SOL 9/28/2019	
Date/Time CV Reported Thu, 03/29/2018 11:34 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Thu, 03/29/2018 11:34 AM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Joseph Fallon	30514	954791	PSA 9
2. POM Frank Ryan	21262	952201	PSA 9
3. SGT Brian Mcelroy	04047	937062	PSA 9

Officer(s)	Allegation	Investigator Recommendation
A.POM Frank Ryan	Abuse: Police Officer Frank Ryan stopped § 87(2)(b)	
B.POM Frank Ryan	Abuse: Police Officer Frank Ryan frisked § 87(2)(b)	
C.POM Joseph Fallon	Abuse: Police Officer Joseph Fallon stopped individuals.	
D.POM Joseph Fallon	Abuse: Police Officer Joseph Fallon frisked individuals.	
§ 87(4-b), § 87(2)(g)		

Case Summary

On March 29, 2018, § 87(2)(b) filed the following complaint by phone with the CCRB on behalf of her then 11-year-old son, § 87(2)(b) did not witness the incident.

On March 28, 2018, at approximately 7:50 p.m., § 87(2)(b) was walking to meet § 87(2)(b) in the grounds of the Queensbridge Houses NYCHA complex in Queens. When § 87(2)(b) reached the area in front of a daycare center located at 10-26 41st Avenue, he encountered a group of men whom he recognized from the neighborhood. Police Officer Frank Ryan, Police Officer Joseph Fallon, and Sergeant Brian McElroy, who were assigned to PSA 9 at the time, arrived in a vehicle and approached the group. PO Ryan stopped and frisked § 87(2)(b) (Allegations A-B: Abuse of Authority, § 87(2)(g)). PO Fallon stopped and frisked two unidentified individuals (Allegations C-D: Abuse of Authority, § 87(2)(g)). The incident did not result in any arrests or summonses.

§ 87(4-b), § 87(2)(g)

The investigation did not obtain any video footage of the incident.

Findings and Recommendations

- **Allegation (A) Abuse of Authority: Police Officer Frank Ryan stopped § 87(2)(b)**
Allegation (B) Abuse of Authority: Police Officer Frank Ryan frisked § 87(2)(b)

It is undisputed that PO Ryan stopped and frisked § 87(2)(b). § 87(2)(b) recounted that he was walking east past the daycare center, and that the group of men was walking west (BR01). He recognized them, and as he passed them, § 87(2)(b) did a quick handshake with one of the men. The handshake consisted of § 87(2)(b) and the man clapping the open palms of one of their hands together twice in quick succession. § 87(2)(b) did not exchange anything with the man. At that moment, the officers pulled up in their vehicle, and the man with whom § 87(2)(b) had performed the handshake emptied the liquid contents of a cup into a nearby patch of grass.

The officers exited, and PO Ryan approached § 87(2)(b) and asked him for his age. § 87(2)(b) replied that he was § 87(2)(b) old. PO Ryan then felt the outside of § 87(2)(b)'s upper body and waist, including the outsides of his jacket pockets and pants pockets. PO Ryan did not enter § 87(2)(b)'s pockets. One of the men told PO Ryan that he should not be searching § 87(2)(b) as he was under the age § 87(2)(b). One of the officers responded with a statement regarding how drugs can be given to younger children. Shortly after PO Ryan finished frisking § 87(2)(b) the officers got back into their vehicle and drove away. § 87(2)(b) did not observe the officers' interaction with the other men.

As will be discussed in the section concerning allegations C & D, the investigation was unable to positively identify the other men who were stopped during the incident. § 87(2)(b) the sole civilian witness whom the investigation successfully contacted, confirmed that § 87(2)(b) had been walking in the opposite direction as the group of men (BR02). He also confirmed that some of the men had been drinking alcohol, and that one of them dumped out the contents of a cup upon seeing the officers.

PO Ryan recounted that the location of the incident is an area in which people frequently congregate while drinking alcohol and smoking marijuana (BR03). When presented with such groups, PO Ryan and other officers typically instruct them to disperse and to refrain from

drinking and smoking in public. Upon arriving at the location during this incident, PO Ryan saw a group of about 5-10 people who appeared to be drinking alcohol and smoking marijuana. At that point, PO Ryan's sole reason for believing that the individuals were drinking alcohol was because some of them were holding cups. PO Ryan thought the individuals were smoking marijuana because there was a strong odor of marijuana in the area. He did not actually see any smoke in the area, and he did not see anyone smoking anything.

PO Ryan could not specifically recall if § 87(2)(b) was a standing amongst the group when he first observed it. He could not recall if he ever saw § 87(2)(b) holding a cup.

As the officers drove closer to the group, its various members seemed to notice the officers' presence and they began to walk away in different directions. At that time, one group member threw something into a nearby trashcan. PO Ryan also thought some of the group members threw their cups into a nearby patch of grass.

PO Ryan approached the group to try to determine if they were drinking alcohol and smoking marijuana. He did not suspect any of the group members of any other criminality, and he did not suspect that any of them was armed. PO Ryan did not see any of the group members shake or slap hands. He admitted that he did not see any group member appear to hand anything to any other group member, though he noted that such an exchange would have been difficult to see due to the close proximity of the group members to one another.

The officers did not try to stop any group members from leaving, and when PO Ryan reached the area, § 87(2)(b) and two unidentified men were the only individuals remaining. PO Ryan thought § 87(2)(b) looked about 14-16 years old. PO Ryan first looked into the trashcan, and he thought that he observed a glass bottle that was labeled for an alcoholic drink. He could not recall if the bottle was like those typically used for liquor, wine, or beer, and he could not recall the contents of the label. PO Ryan then approached § 87(2)(b) who began to walk away toward the officers' vehicle. PO Ryan said something to the effect of, "Hey, can you give me a second?" § 87(2)(b) stopped walking.

By this time, PO Ryan had seen a bulge in § 87(2)(b)'s front right pants pocket. PO Ryan described the bulge as appearing to be caused by a "heavy" object because it hung low in the pocket. He described it as being roughly square-shaped, and he estimated that its longest sides were about five inches long. PO Ryan suspected that the bulge could have been a firearm, and he did not want § 87(2)(b) to leave the scene because of the presence of the bulge. PO Ryan had no additional reason for suspecting that § 87(2)(b) was armed. PO Ryan approached § 87(2)(b) frisked the bulge, and determined that it felt like a cellphone. He denied frisking any other part of § 87(2)(b)'s body. § 87(2)(b) then walked away from the scene of the incident. PO Ryan confirmed that Sgt. McElroy never instructed him to stop or frisk § 87(2)(b).

PO Ryan's memo book entry for the incident only notes that three individuals were stopped in relation to an "open container" violation (BR04). PO Ryan also created a UF250 report regarding the incident, which indicated that he suspected § 87(2)(b) of possessing a weapon (BR05). However, the report makes no mention of any bulge on § 87(2)(b)'s person. In fact, in the section detailing the basis for the frisk, PO Ryan wrote that § 87(2)(b) had been "walking away from [a] group," and that § 87(2)(b) "was possibly passed contraband while officers approached." When questioned about the UF250 report, PO Ryan claimed for the first time that he thought it was possible that one of the group members had given § 87(2)(b) a firearm, which then created the bulge in § 87(2)(b)'s pocket. He could not recall if he made any specific observations to lead him to that suspicion, and he again confirmed that he had no

specific recollection of seeing anyone give anything to § 87(2)(b). The UF250 report also made no mention of the odor of marijuana, which PO Ryan explained as an oversight on his part.

PO Fallon similarly recounted that officers frequently encounter people drinking alcohol and smoking marijuana at the location (BR06). He only recalled seeing § 87(2)(b) and the two unidentified men at the location. Both men were holding and drinking from cups, and one was holding what appeared to be a lit marijuana cigarette. PO Fallon also smelled an odor of marijuana in the area. PO Fallon explicitly stated that § 87(2)(b) was not holding a cup or a marijuana cigarette.

PO Fallon recounted that, as the officers' vehicle came to a stop on scene, the two men threw down their cups and the marijuana cigarette. One of the men then touched one of § 87(2)(b)'s hands. The man's hand and § 87(2)(b)'s hand touched briefly. § 87(2)(b) then began to walk away, while the two men began to walk away in a different direction. PO Fallon thought it looked like the man had given something to § 87(2)(b). However, PO Fallon admitted that he did not actually see an object in either hand. He further explained that his view was obstructed because § 87(2)(b) was facing the man whose hand he touched while he had his back turned to the officers.

PO Fallon then approached, stopped, and frisked the two men. PO Fallon explained that he stopped the two men to determine if they had a firearm, and if they had passed something to § 87(2)(b). The two men admitted that they had been drinking alcohol and smoking marijuana, denied that they had any guns, denied that they had passed anything to § 87(2)(b) and consented to PO Fallon frisking them. Despite the men's admissions, PO Fallon took no enforcement action, as he is concerned with firearms and typically does not take enforcement action with regard to public drinking of alcohol or smoking of marijuana.

PO Fallon did not see any of PO Ryan's interaction with § 87(2)(b). PO Fallon never recounted seeing any bulges on § 87(2)(b)'s person. PO Fallon's UF250 report regarding the incident made no mention of anyone having passed anything to anyone else (BR05). PO Fallon's memo book entry merely noted that three individuals were stopped in relation to an "open container" violation (BR04).

Sgt. McElroy also recalled seeing group members holding cups and smoking a marijuana cigarette, but he confirmed that he never saw § 87(2)(b) holding a cup or a marijuana cigarette (BR07). He did not see any group member touch hands with § 87(2)(b) or appear to hand him anything. Sgt. McElroy did not know why PO Ryan frisked § 87(2)(b) and he denied that PO Ryan ever told him later that he had observed any suspicious bulges on § 87(2)(b) or had suspected him of being armed.

Patrol Guide Procedure 212-11 states that, in order to stop someone, an officer must have reasonable suspicion that the individual has committed, is committing, or is about to commit a crime. In defining reasonable suspicion, the Patrol Guide states, "The officer must have a particularized and objective basis for suspecting the person stopped of the criminal conduct. The officer must be able to articulate specific facts establishing justification for the stop; hunches or gut feelings are not sufficient." In addition, an officer may only frisk someone if he or she reasonably suspects that the person is armed and dangerous (BR08).

An individual may not be forcibly stopped merely because he or she is seen in the company of another whom the police have probable cause to arrest. *People v. McLoyd*, 35 Misc. 3d 822 (Sup. Ct., NY Cty. 2012) (BR09).

Absent additional factors, the mere presence of an undefinable bulge in a person's pocket does not provide reasonable suspicion that the person is armed. (See: *People v. Black*, 972 N.Y.S.2d 145, 2013) (BR10); *People v. Crawford*, 89 A.D.3d 422 (1st Dept. 2011) (BR11); *People v. Taveras*, 155 A.D.2d 131 (1st Dept. 1990) (BR12)).

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

- **Allegation (C) Abuse of Authority: Police Officer Joseph Fallon stopped individuals.**
Allegation (D) Abuse of Authority: Police Officer Joseph Fallon frisked individuals.

It is undisputed that PO Fallon stopped and frisked two unidentified men.

§ 87(2)(b) could not provide names for any of the men present during the incident, and PO Fallon never learned the names of the two men he stopped. The investigation made lengthy and extensive efforts to attempt to identify and speak to the two men who were stopped and to any other civilian witnesses. The investigation ultimately learned the name of one of the two men from § 87(2)(b) but he did provide a confirmed spelling of the name. The investigation found arrest reports from the area for a man with the same name (if spelled phonetically), and database searches also showed that a man by that name had prior or current residences in the Queensbridge Houses. However, the investigation was never able to reach that man and was therefore unable to confirm if he was one of the men who was stopped during the incident. The investigation never even obtained a name for the second man who was stopped.

§ 87(2)(g)

- § 87(4-b), § 87(2)(g)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) and § 87(2)(b) have been party (BR13).
- Police Officer Frank Ryan has been a member of the NYPD for six years, and has been a subject in eight complaints and 12 allegations, none of which was substantiated. One of the complaints, case #201801064, is still under investigation. § 87(2)(g)
- Police Officer Joseph Fallon has been a member of the NYPD for five years and has been a subject in four complaints and nine allegations, none of which was substantiated. One of the complaints, case #201801064, is still under investigation. § 87(2)(g)
- Sergeant Brian McElroy has been a member of the NYPD for 13 years and has been a subject in one complaint and one allegation, which was not substantiated.

Mediation, Civil and Criminal Histories

- § 87(2)(b) declined to mediate this complaint.
- On September 23, 2018, the undersigned requested a copy of any Notice of Claim filed with the NYC Comptroller's office regarding this incident (BR14). As of the date of this report, no response has been received. A copy of the response will be added to the case file upon receipt.
- As § 87(2)(b) is still only § 87(2)(b) old, he has no record of criminal convictions.

Squad No.: 5

Investigator:	_____	Inv. Daniel Giansante	_____
	Signature	Print Title & Name	Date

Squad Leader:	_____	_____	_____
	Signature	Print Title & Name	Date

Reviewer:	_____	_____	_____
	Signature	Print Title & Name	Date